

Normal agricultural and silvicultural practices are exempt but the interpretive rule issued in 2014 (later rescinded) to clarify the 56 practices that are exempt from CWA Section 404 permitting was very confusing to farmers. Other issues for rural communities is the NPDES permits for application of pesticides and herbicides in WOTUS. Also, there is a concern that 'prior converted croplands' which are exempt if they are certified by NRCS are also exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act). However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA. These issues combined with the complexity of the WOTUS and the role of the NRCS poses significant issues for the agricultural sector and rural communities.



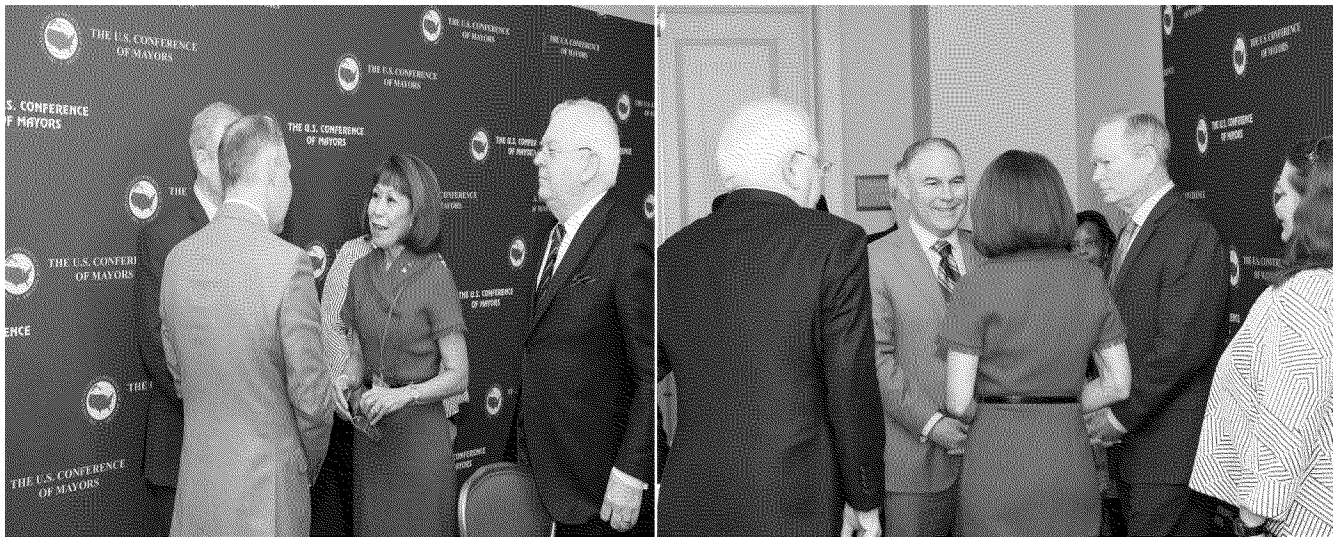
"The Small Community Advisory Subcommittee (SCAS) received many great comments from across the nation, particularly as the issue applies to agriculture and small communities. We have done our best to incorporate them into our recommendations, and hope we can help to formulate a clean water rule that can work across the nation."

*Commissioner Dr. Robert Cope, DVM
Salmon, ID, Chair of Small Community Advisory
Subcommittee*

Commissioner Dr. Robert Cope, DVM, Salmon, ID
Chair, Small Community Advisory Subcommittee

H. Outreach to Local Governments

There is a need for enhanced outreach to local governments. Its significance in WOTUS decision-making is all the more critical. A comprehensive communication strategy is needed for local governments that improves the channels of information distribution, and explicit communication at all levels of government. Getting information into the hands of local governments where it will have the most impact must be a priority. This is particularly relevant in small, disadvantaged and ethnically diverse communities. Local governments need to act effectively so that information will reach all relevant parties so it can also be readily communicated effectively to citizens.



Administrator Pruitt meets with Mayor Elizabeth Kautz, Burnsville, MN and Vice-Chair, Protecting America's Waters Workgroup-at the U.S. Conference of Mayors, Photo Source: Eric Vance, EPA

Therefore, there will be a pressing need to improve governmental communication and transfer of information among the EPA, state, tribal and local governments, and to get that information out to the public. Specific tailored information for local elected officials is also needed to convey the effective changes of any new WOTUS rule.

I. Financial Sustainability

One of the common themes heard by LGAC members revolves around affordability. This issue has several components including compliance, pollution and clean-up costs, punitive costs that only serve to reduce local government resources and the disproportionate costs for small and economically disadvantaged communities.

"A change in culture is necessary in managing our water resources. Working together to solve our problems is what is needed rather than imposing fines on cities who already cannot pay." Mayor Elizabeth Kautz, Burnsville, Minnesota and Vice-Chair of the Protecting America's Waters Workgroup



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528 If the goal is safe, clean water throughout the country, innovation in approach and cost allocation must
529 be considered at the federal, state and local levels.



*"Waters of the U.S. needs an education piece so that others are given a clear understanding that clean and safe water is a precious resource connected to everything-the water we drink and the food we eat. And we have a responsibility to protect it not only this generation but the generations to come." Samara Swanston
Counsel to the New York City Legislature*

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531 Samara Swanston, Counsel to the New York City Legislature

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534 III. Response to Charge: Findings and Recommendations

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536 ☐ **Question: 1-** How would you like to see the concepts of 'relatively permanent' and 'continuous
537 surface connection' be defined? How would you like to see the agencies interpret 'consistent with
538 Scalia'? Are there particular features or implications of any such approaches that the agencies
539 should be mindful of in developing the step 2 proposed rule?

540

541 **1.a. How would you like to see the concepts of 'relatively permanent' and 'continuous surface
542 connection' be defined?**

543

544 *Background*

545 In the *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court provided a plurality decision
546 of four justices, led by Justice Scalia. The decision basically challenged federal jurisdiction to regulate
547 isolated wetlands under the Clean Water Act. It also applied a very narrow interpretation to CWA
548 jurisdiction, extending the agencies' regulatory authority only to "relatively permanent, standing or
549 continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a
550 continuous surface connection to" such relatively permanent waters. Justice Kennedy focused on whether
551 the waters in question have a "significant nexus" to traditional navigable waters, *i.e.*, whether they,
552 "either alone or in combination with similarly situated lands in the region, significantly affect the chemical,
553 physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

The LGAC has previously commented that they would prefer a clear and simple approach for jurisdictional determinations such as an approach that yields categorical answers of jurisdiction in these categories: 'yes', 'no' or 'maybe' responses. Any of these answers are sufficient for local governments if these answers are provided in a timely fashion.

Recommendations



EPA and the Corps should apply simple approaches that yield jurisdictional calls with simple criteria that give a 'yes', 'no' or 'maybe' answer. (2014 LGAC Report)



The LGAC recommends the following Potential Approaches to Wetlands with a "Continuous Surface Connection" - "Relatively Permanent" Waters

Jurisdictional

- ✦ Streams with seasonal flows or streams with another offflow which should not capture ephemeral and intermittent streams into the definition of "relatively permanent" waters. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.
- ✦ Perennial streams only as "relatively permanent waters".
- ✦ Wetlands that directly touch jurisdictional waters are jurisdictional. However, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial (and not include ephemeral and intermittent connections).
- ✦ Wetlands with permanent, continuously flowing, surface connections should be included as jurisdictional.

Non Jurisdictional

- ✦ Erosional features in the arid West, such as arroyos and dry washes should be 'non-jurisdictional'.
- ✦ Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.
- ✦ Develop metrics to identify when "some degree of connectivity" should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided if at all possible.
- ✦ Wetlands where connections do not exist should be exempted from jurisdiction.

- ✦ Overland flows that flow through dryland breaks to a WOTUS (rendering a tributary up gradient of the dryland break) should be non-jurisdictional.
- ✦ Water features that may be present (for example, residual ponds resulting from placer or other mining efforts) are not jurisdictional and where a continuous physical channel is absent; a bed-and-bank is not discernible; an ordinary high water mark is not observable; and/or there are no flow characteristics are not jurisdictional.

1.b. How would you like to see the agencies interpret 'consistent with Scalia'?

Background

EPA and the Corps issued the 2008 guidance document following the Rapanos case that was intended to clarify WOTUS. It does so by asserting CWA jurisdiction over waters that would meet *either* the plurality test (relatively permanent; continuous surface connection) *or* the Kennedy test (significant nexus). In the Guidance and Memorandum of Agreement between the Corps and EPA, there is a list of key questions and answers, that generally breaks the jurisdictional analysis into three major categories. *NOTE: This guidance did not go out sufficiently for public review and was not communicated well to local governments and other stakeholders.* The first, and presumably more manageable, category includes those waters over which CWA jurisdiction will be asserted in every case; those that do not and the maybe that have a 'significant nexus'.

Recommendations:

■ Criteria as outlined in the 2008 guidance should be used for a revised rule which provides criteria.

■ Definitions should be modified to address clearer definitions. A series of questions using criteria should be used to determine 'relatively permanent or continuous'. If answers are 'yes' or 'no' it leads to a 'yes', 'no' or 'maybe' jurisdictional determination. **If there is a 'maybe', it diverts to state specific criteria for jurisdictional determination.**

1.c. Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

■ EPA and the Corps should establish an Interagency Taskforce to develop the matrix of questions to determine 'permanent' and 'continuous' indicators. Their results should be published and the public given the opportunity to give comment. (LGAC 2014 Report)

■ The LGAC recommends the following state specific criteria for the revised rule:

Intermittent streams, playa lakes, wetlands, and other waters:

- ✦ In cooperation with states, the EPA should designate intermittent streams and other waters as non-waters of the U.S. based on the following criteria:
 - Seasonal flow of running or standing water — each state to develop its own criteria subject to EPA review and approval;
- ✦ Because of the variability of conditions within and between states, the EPA should provide guidelines for state standards that include factors to be considered, but which do not constitute federal standards.

Such factors to include are:

 - Average number of days of stream flow;
 - Seasonality of stream flow;
 - Rate of stream flow;
 - TMDL levels during such periods, amount of water and TMDLs delivered to the "discharge" body of water; and
 - Any other relevant factors as the Agency deems appropriate.
- ✦ State standards/factors should reflect possible ground water recharge rates from intermittent streams, playa lakes, wetlands, and other waters. Similarly, factors should include the potential contamination of ground water from such water bodies.
- ✦ States shall develop metrics for each standard they propose and submit to the EPA for review and approval. EPA to have 120 days from receipt of a completed state plan to review, propose revisions, or deny the submitted standards and metrics. Failure to complete the analysis within 120 days, subject to the EPA and state agreeing on a time extension, shall result in the submitted standards and metrics being deemed accepted.
- ✦ Three years after the state-submitted standards are accepted, each state shall submit a report to the EPA detailing whether the waters in question continue to meet the EPA -accepted standards, as determined by the state's metrics. The EPA shall determine whether each state shall submit subsequent reports on an annual or other timeline basis.
- ✦ Generally accepted scientific findings on issues that may affect water quality standards related to intermittent streams, playa lakes, wetlands, or other designated waters are determined, the EPA may request states review their standards and submit proposed revised plans for the Agency's consideration and approval.

Permanent Bodies of Water:

- ✦ Many wetlands are seasonal and have been addressed above. For those that are permanent, states should be empowered to develop metrics that demonstrate whether the waters released from the wetlands to jurisdictional waters are "cleaner" than the waters that otherwise would flow to those jurisdictional waters if the wetlands were not present.

- States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should have 120 days from receipt of completed state plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 120 days, subject to extension if the EPA and state agree, the submitted plan shall be deemed accepted.
- States should be encouraged to develop criteria and metrics regarding wetlands and other water bodies that impact on ground water quality.

■ An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and sent to all interested parties. (LGAC 2014 Report)

■ Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and green infrastructure amenities should be exempt from jurisdiction. Where possible, EPA and the Corps should work with State, local and tribal governments to map these features as well. *NOTE: Drinking water and wastewater treatment utilities may have these features mapped as part of Asset Management features* (LGAC 2014 Report)

- **Question 2- What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?**

Background

Cities and communities care deeply about the quality of water. One concern is that a rule that is left entirely to interpretation and does not provide sufficient clarity, may add to costs and delays without causing important improvement to water quality. (*Iowa NLC's letter*) We understand that the goal is to make it easier to identify WOTUS and a rule interpreting the Scalia decision may not draw bright enough lines for local governments to easily identify those waters affected. Therefore, the use of the Scalia approach in and of itself is unlikely to significantly resolve all of the considerable uncertainty surrounding CWA jurisdiction (either then or now), or prevent continuing litigation to test the agencies' interpretations in the federal courts. However, the 2008 guidance does have criteria that will pose less uncertainty and yield faster results. If the 2008 guidance were to be revised to include clearer definitions with input from states, local and tribal governments and other stakeholders and state specific criteria it could perhaps help to resolve these issues.

Recommendations

■ Relying on a modified Scalia approach and incorporating the 2008 guidance into a revised rule can provide a clearer certainty of federal jurisdictional waters which will lead to more certainty and more ease in permitting.

- **Question 3: Are there other approaches to defining "waters of the U.S." that you would like the agencies to consider to providing clarity and regulatory certainty?**

Background

The 2008 guidance document (issued post- Rapanos) offers assistance and criteria to assess jurisdiction of WOTUS (post- Rapanos). It is consistent with the Scalia approach but also asserts criteria to be used for further consideration of CWA jurisdiction (over some waters). This approach would reflect the opportunity to cover waters significant to states, locals and tribes. The new WOTUS rule should also confirm certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, and "puddles."

Recommendations:

The LGAC recommends that a similar approach articulated in the guidance to the 2008 guidance be used to revise the WOTUS rule.

"Significant nexus" test refers to waters that "significantly affect the chemical, physical, **and** biological integrity" of traditionally navigable waters, the 2015 WOTUS Rule covers waters that affect the "chemical, physical, **or** biological integrity" of navigable waters. That should be changed to 'and' and include all three parameters. (LGAC 2014 Report)

The 2015 rule regulates any area having a trace amount of water if it also has – or ever had – a bed, banks, and an ordinary high water mark (OHWM). This could include many channels and other features that are almost perpetually dry. For the 2017 revised rule, there should be more predictability and certainty in general if there is a dry bed with a OHWM (with historical aerial or infrared photography that it can be established as a WOTUS) or exempt.

- Question 4-The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?

Background

A revised Clean Water Rule is expected to have increased clarity and certainty to the process of making jurisdictional determinations under the CWA. Individual jurisdictional determinations can be time-consuming and resource-intensive for the agencies, permittees, business community and local governments. A final rule should be designed to reduce the uncertainty and clarify categories of waters that are jurisdictional or not jurisdictional by simplifying the process. Clarifying the CWR will reduce the costs and have positive economic benefits. However, the rule itself does not incur direct costs. The rule only applies when a permit is required for a pollutant discharge that would degrade, pollute or destroy a waterbody. On a positive jurisdictional call, it is uncertain the direct costs and who would pay the costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the costs of positive or negative determinations which could both potentially trigger activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to waterbodies that are used for drinking water sources. Because of the high costs of water treatment to meet drinking water

standards these costs are often transferred directly to the rate payer and citizens. If a waterbody is polluted or destroyed, then cost at the local level could pose serious economic costs. Whereas, under a CWA permit, the permittee would seemingly be required to pay mitigation costs rather than the costs transferred to the local government or rate payer. Also, as state or local programs assume more authority, likely with more efficiency, the costs to manage and assume these permitting burdens could drastically increase. And states and local governments would not be able to assume these costs. Therefore, the economic analysis should be broad and the direct and indirect costs be considered.

Recommendations:

The Economic Analysis should be broad to include impacts to not only Clean Water Act programs but also state and local programs.

Below are programs from a local government perspective that should be considered in the Economic Analysis:

- **Source Water Protection**-There is a general consensus that protecting the nation's water resources is important to local government. Local governments realize that poor water quality affects the health and economies of their communities, disproportionately impacting those that are low-income. Local governments also realize that protecting source water bodies like rivers, lakes, streams, wetlands and groundwater is paramount to protecting drinking water. (LGAC 2016 Drinking Water Report). **Under the Safe Drinking Water Act**, Source Water Assessments (SWAs) provide information about sources of drinking water used by public water systems. SWAs are studies or reports developed by states to help local governments, water utilities, and others protect sources of drinking water and are done differently by each state. Each program is adapted to a state's water resources and drinking water needs. To protect source water, the tools of the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) programs are utilized to protect source water. Additional protection tools can be found in other EPA programs and various agricultural programs. Changes made to CWA programs may greatly impact state and local source water protection programs and plans. This could have significant economic impacts to local communities. For example, in Flint, Michigan shifting the source water to the Detroit River water resulted in significant deterioration of water quality that produced significant public health and economic problems. In Portland, Oregon where source water is protected it results in less cost to the rate payers by having Clean Water Protection programs in place. It is unclear how changes in a revised rule will impact streams and tributaries that impact local sources of drinking water. If adequate CWA protections are not in place it could have significant negative economic impacts to water utilities. This costs are likely be transferred to local governments and rate payers. It is also unclear how this may impact the prevalence of toxic algal blooms which have proved very costly on drinking water.

- **CWA Section 402** - The NPDES permits and discharges could hold significant economic issues for local governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of pesticides (used for vector control). There has been a concern about expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, the final rule includes exclusions beneficial for those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a long-standing exclusion for "waste treatment systems," such as treatment ponds and lagoons. It also adds new exclusions for

artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the rule finally codifies the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the rule has been that it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are “waters of the US.” That could mean, for example, that NPDES permit coverage would be required to discharge **into** an MS4 or that a CWA 404 permit would be required to do maintenance on a BMP. The final rule includes, for the first time, a regulatory exclusion for “Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.” However, the exclusion does not apply to ditches that were created in previously existing streams or wetlands. The rule’s exclusions are important because they take precedence over the rule’s jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test. Furthermore, in a reversal of EPA and the Corps’ previous position, the agencies stated that they do not retain any discretion to extend CWA jurisdiction to water features that qualify for one of the rule’s exclusions. It is unclear how a revised rule will impact Section 402 permits. Potentially, Section 402 permits could prove more costly than Section 404 permitting at the local level in regard to stormwater and wastewater treatment.

- ✦ **Pesticide Applications in Waters of the U.S.-** Since 2011, pesticide applications into, over, or near WOTUS are permitted under the CWA National Pollutant Discharge Elimination System (NPDES) Program due to a 2009 U.S. Court of Appeals for the Sixth Circuit ruling. Agricultural producers, pesticide applicators and local governments have opposed or expressed concerns on the permitting largely on the grounds that it is duplicative and unnecessary to regulate pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Local governments, mainly county governments are largely responsible for vector control programs to manage mosquitos and spraying of insecticides to reduce vectors and public health concerns. Although the CWR would have arguably expanded the scope of the waters requiring pesticide permitting, the replacement or elimination of the CWR will not end NPDES requirements for pesticides however it may provide opportunity to clarify what discharge waters are subject to federal versus state permits.

- ✦ **Section 303 (d)-** Currently, The National Rivers and Streams Assessment (NRSA) 2008-2009 report provides information on the biological and recreational condition of the nation’s rivers and streams and the key stressors that affect them. The Report indicated that about half of our nation’s streams (some of which provide sources of drinking water) have poor water quality. Poorer water quality could result in significant treatment costs such as Impaired Water sites under CWA Section 303(d) and transfer the costs to local governments. In addition, communities that rely on these water bodies for drinking water and source water the cost will ultimately be transferred to rate payers having a significant economic impact to local governments. It is uncertain how changes in a revised WOTUS rule will impact on local governments and their local efforts to improve access to clean water.

- ✦ **Section 319 and Other Grants-**It is uncertain as to how the determination of WOTUS will impact grants to states and communities. A grant may be given a priority if it given to protect a Water of the U.S. It is uncertain how that would impact states and communities.

- 4 The Coastal Zone Management Act (CZMA) of 1972 provides for the management of the nation's coastal resources, including the Great Lakes. The goal is to "preserve, protect, develop, and where possible, to restore or enhance the resources of the nation's coastal zone." it is administered by the National Oceanic and Atmospheric Administration (NOAA). The National Coastal Zone Management Program aims to balance competing land and water issues through state and territorial coastal management programs through state and locally managed Coastal Zone permits. These CZMA Programs work in tandem with the many tools of the CWA including Section 404. The Economic Analysis should include an assessment of the economic impact to coastal resources and wetlands, including an economic impact analysis to water dependent industries such as fishery (salmon and seafood industry), tourism, and other water dependent industries. For example, in the Puget Sound region, fish hatchery and harvest operations reeled in about \$18 million to tribal personal income. In areas where the average annual per capita income is around \$10,000, a decline in the availability of healthy fish can significantly impact the economies of these communities. (LGAC Drinking Water Report). An example, the LGAC worked with is evaluating the impacts of the Deepwater Horizon Spill to local governments in the Gulf of Mexico. The Gulf fishing and tourism industries produce \$3.5 - \$4.5 billion a year. Without adequate federal CWA authorities in place other potential impacts could occur having deleterious impacts to local economies and natural resources.

Question 5- What additional information can you provide from a local government perspective that EPA should be aware of?

DEFINITIONS

Background

Clear definitions are critical for the revised WOTUS rule. The LGAC fully supports and endorses EPA's efforts for clarification of Waters of the United States. These improvements are long overdue. The LGAC highlights clarity in definitions is critical for the revised rule. While the LGAC does not have specific language recommendations for all of the definitions of a revised rule, the LGAC offers the following for the EPA to consider including, redefining or clarifying in the rule.

Recommendations:

The LGAC puts forward the following definitions brought forward to consider in the 2017 WOTUS Rule.

EPA should, where appropriate, use definitions that are used consistently across all of the federal agencies, e.g. EPA, Army Corps of Engineers, Federal Emergency Management Agency, Department of Agriculture, U.S. Geological Survey and U.S. Forest Services.

EPA should task an Interagency Workgroup to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.

Definitions be should be practical, written in plain English, and be enforceable.

897 The LGAC recommends that narrative descriptions with examples be provided to augment the
898 definitions, as well as pictures, where this could achieve greater clarity.
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900 The public have the opportunity to comment on these proposed definitions.
901

902 The following terms, among others, should be defined concisely and with clarity: 'other waters',
903 'significant nexus', 'adjacent' and 'upland'. Furthermore, the LGAC recommends 'upland' be defined
904 based upon exclusion of what it is not.
905

906 The LGAC recommends that EPA consider the following when defining these terms:
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908 **Wetlands**

- 909 The current definition of wetlands should be used: "areas that are inundated or saturated by
910 surface or ground water at a frequency and duration sufficient to support and that under normal
911 circumstances do support a prevalence of vegetation typically adapted for life in saturated soil
912 conditions. Wetlands generally include swamps, marshes, bogs and similar areas."
913

914 **Floodplains**

- 915 The definition of the Interagency Taskforce on Floodplains should be used: "Floodplains include
916 low-lying areas adjacent to and the water bodies of streams, rivers, lakes, estuaries, and coastal
917 zones that are inundated or may become inundated as a result of changing conditions." The
918 definition of floodplains should take into account movement of flood lines due to account extreme
919 weather events.
920

921 **Riparian area**

- 922 The LGAC recommends that riparian areas be defined as "an area bordering a water where
923 surface or subsurface hydrology directly influence the ecological processes and plant and animal
924 community structure in that area. Riparian areas are transitional areas between aquatic and
925 terrestrial ecosystems that influence the exchange of energy and materials between those
926 ecosystems."
927

928 **Floodway**

- 929 'Floodway' should be defined as a flood course within the banks or within a canyon where water
930 would be expected to flow under normal circumstances.
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932 **Ditches**

- 933 A clear definition of 'ditch' should be provided in the proposed rule.
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- 935 The following Google Dictionary definition of 'ditch': a "narrow channel dug in the ground
936 typically used for drainage". Examples listed are trench, croft, channel, dike, drain, watercourse
937 conduits.
938

939 **Significant Nexus**

- 940 The most important definition contained within the proposed rule and at the heart of
941 jurisprudence in the issue of Waters of the U.S. It is uncertain how 'significant' nexus would be
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interpreted so the Committee recommends EPA describe significant nexus such that it is in plain English, with specific terms and examples.

- ✦ The agency should consider all three parameters of water quality “the chemical, physical, and biological integrity of water” as criteria for ‘significant nexus’. Likewise, the LGAC does not agree that only one of these features be used as the benchmark, but that all three parameters of chemical, physical and biological integrity of a water body are all equally important.
- ✦ The LGAC does not agree with the use of the term “significant effect” and also recommends language of “insignificant or speculative” should not be used.
- ✦ EPA charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The LGAC is uncertain as to how the revised rule will make benefit of these important and critical definitions; however, the findings may be important to factor into a revised rule. (REWRITTEN from LGAC 2014 Report)

Streams and Tributaries

Tributaries

- ✦ A clear definition of ‘tributaries’ be included in the proposed rule using clarifying examples.

Streams

- ✦ The revised rule should define the term “rain dependent stream”. An example of a stream that is not rain dependent be provided.

ENVIRONMENTAL JUSTICE

Background

The LGAC would like to assure that all but especially EJ, small, rural and tribal communities have access to safe drinking water and its water source is protected and accessible (some disproportionately affected communities don't have access to drinking water).

EJ Communities:

- ✦ Must have regulation and enforcement that is coordinated between all levels (fed, state and local) to assure we protect water now and for our future generations as water is life.
- ✦ Must have protections against current contaminants but as well engage science community to prepare for new and emerging water contaminants, as we need to preserve safe drinking water, recreational water and water life for many communities (EJ and tribal) depend on it for food.
- ✦ Need to have clearly defined WOTUS, what they are and engage them to better understand these definitions to protect these valuable watersheds and bodies of water.
- ✦ Look to local communities for local solutions and work on infrastructure resources for EJ communities to ensure safe and accessible drinking water.

- ✚ Must be assurances that for all issues of WOTUS that EJ communities are included in any analysis to assess cumulative risks for the lack of safe drinking water and/or for being exposed to contaminated water (lead, mercury)
- ✚ Need to be integrated in urban and rural planning in coordination with state and federal partners for Flood control impacts.

Recommendations:

✚ The revised rule should serve as another important tool towards advancing clean safe drinking water for all communities throughout the country but especially for EJ, small, rural and tribal communities.

✚ The revised rule must include promotion and protection to access of reliable, safe, and clean drinking water especially for disproportionately affected low income EJ communities (who already have significant health disparities) and vulnerable populations across the country.

✚ The revised rule should protect communities against downstream impact of agricultural runoff, sewage, industrial waste, mining, and improper disposal of medical waste.

✚ The revised rule must assure protection of water bodies from contamination that can significantly harm the health of a community.

☐ **Question 6- Are there other issues the agencies should consider which would help ease the regulatory burden for implementation of WOTUS for state, local and tribal government?**

Background

The LGAC believes that clear boundaries of WOTUS jurisdiction and clear exemptions are crucial for the support of local governments. Clear boundaries provide for more equitable and predictable permitting and also for better protection of our water resources. (LGAC 2014 Report)

The LGAC concludes, based upon the testimony that we heard and the analysis of the Committee, that a revised rule can significantly clarify the historic confusion and uncertainty resulting from conflicting case law and Supreme Court decisions. (LGAC 2014 Report)

In 2014, the LGAC has heard a broad level of concerns from municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as the proposed rule is currently written. MS4s and green infrastructure are foundational to the continuum of care that is being implemented at the local level to improve water quality. (LGAC 2014 Report)

Much of the uncertainty of MS4s (in 2014), was that stormwater and green infrastructure is centered on whether these collection systems or portions of the systems will be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they

will now be considered a "water of the United States." WQS and TMDL were not designed for this application so application within a collection system seems improper. WQS define goals for a waterbody by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default required designated use is as "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as storm-water conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption). Also, if it is not deemed jurisdictional under Section 404 it will likely need a Section 402 permit and subject to WQS. (Goodman Letter)

There could be potential impacts to wastewater systems and the NPDES permitting related to these systems. Because of the exclusion language, the Agency did not seem to analyze the impact to wastewater systems but some cities have raised questions whether some part of combined sewer systems or other aspects of a wastewater treatment systems would be considered within the jurisdiction of the EPA based upon the WOTUS rule. (Goodman Letter)

Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. A revised rule should recognize that much of the action towards cleaner water happens at the local level. High performing local agencies should be noted as following best practices and afforded a relaxed regulatory environment in those circumstances where water quality objectives are met and exceeded. (LGAC 2014 Report)

The LGAC believes that making jurisdiction calls of what is exempt and what is not in a timely fashion is critical to protecting water resources and providing predictability to state and local governments. The LGAC believes that easily accessible predictive tools need to be developed and utilized to speed this process. (LGAC 2014 Report)

Recommendations:

■ The LGAC recommends that the use of State General permits be expanded to reduce the regulatory burden and also be used for smaller projects with minimal impacts. It could also be used to address regional and state specific activities and types of water bodies. Under Section 404(e) of the Clean Water Act, the U.S. Army Corps of Engineers can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects. Nationwide permits can authorize a wide variety of activities such as mooring buoys, residential developments, utility lines, road crossings, mining activities, wetland and stream restoration activities, and commercial shellfish aquaculture activities. All permits, whether individual or general, must be reissued every five years.

■ The LGAC recommends that EPA clearly articulate jurisdictional waters in an outreach plan which, in plain English, describes these areas with a clear statement of why they are in need of protection. This will provide local governments with more certainty and assurance in communicating the rule to their communities. (LGAC 2014 Report)

■ The LGAC highly recommends explicitly specifying when ditches would be considered jurisdictional. (LGAC 2014 Report)

1072 The LGAC recommends that manmade conveyance components of MS4s be exempt from Waters of
1073 the United States. This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade
1074 ditches, manmade drains, and manmade ponds. (LGAC 2014 Report)
1075

1076 The LGAC recommends that natural conveyance components of MS4s are included in Waters of the
1077 United States. This includes natural wetlands and associated modifications to natural wetlands. (LGAC
1078 2014 Report)
1079

1080 The LGAC recommends that green infrastructure projects be exempt from WOTUS and that they
1081 should be incentivized to protect water resources. (LGAC 2014 Report)
1082

1083 The LGAC recommends that there be some criteria which exempt certain activities in Waters of the
1084 U.S. for public safety and hazards. This is particularly critical in flood prone areas and for
1085 disadvantaged communities in floodways that may need to have emergency relief quickly and rapidly.
1086 (LGAC 2014 Report)
1087

1088 The LGAC recommends that EPA work to identify regional areas where jurisdictional determinations
1089 could be problematic in terms of sea level rise and where groundwater and surface flow intermix. For
1090 example, it is unclear how the state of Florida juxtaposed nearly at sea level, will be categorized. In this
1091 specific region, conceivably all waters could potentially be jurisdictional. The LGAC recommends that
1092 specific guidance be developed to address and classify these areas with region-specific criteria used to
1093 assess this determination. (LGAC 2014 Report)
1094

1095 The LGAC recommends that EPA, working with the Corps of Engineers, develop a tool for use by local
1096 governments which a permittee can use to assess their own jurisdictional status. For example, this could
1097 involve a simple categorical, printable questionnaire in a decision tree framework with questions aimed
1098 with an outcome of 'yes', 'no' or 'maybe-call your local Corps representative'. The LGAC recommends this
1099 method be computerized and developed as a smartphone application which yields a simple predictive
1100 outcome. (LGAC 2014 Report)
1101

1102 The LGAC recommends that EPA work directly with stormwater associations to provide guidance to
1103 best address MS4s, stormwater controls, and their jurisdictional determinations. (LGAC 2014 Report)
1104

1105 The LGAC recommends that EPA look to stormwater experts and the practical advice that stormwater
1106 professionals can lend to the final rule the EPA is considering in Waters of the U.S. (LGAC 2014 Report)
1107

1108 The LGAC recommends addressing how mining impoundments or borrow pits will be addressed within
1109 jurisdiction of WOTUS. (LGAC 2014 Report)
1110

1111 The LGAC recommends that regional and local technical manuals as well as other communication tools
1112 (e.g. checklists, smartphone apps, etc.) that account for geographic differences in each EPA region be
1113 developed to assist with jurisdictional calls. (LGAC 2014 Report)
1114

1115 The LGAC recommends that EPA provide planning maps at the state level which could be used as a
1116 planning tool to ascertain jurisdictional probability with high certainty. Such mapping would include the
1117 Hydrologic Unit Codes (HUC) for waterways. (It is presumed that all waterways with a designation of
1118 HUC-12 or less will be included in WOTUS.) (LGAC 2014 Report)

1119 1120 **IMPLEMENTATION**

1121 1122 *Background*

1123 The LGAC heard a strong concern regarding implementation, especially from local governments. Several
1124 local agencies reported uncertainty in interpretation as well as uncertainty in time and cost to conclude
1125 the permit process. The rule language must be consistently interpreted by all parties including the EPA,
1126 the US Army Corps of Engineers and local agencies. The rule should stipulate responsiveness of permitting
1127 agencies. Otherwise, the LGAC is concerned that a revised rule could further delay permits at the local
1128 level. (LGAC 2014 Report)

1129 1130 1131 *Recommendations:*

1132 The LGAC recommends that the rule stipulate time frames for permit review and jurisdictional
1133 determinations. Time frames such as 60 to 90 days to obtain a permit would be well-received at the local
1134 level. (LGAC 2014 Report)

1135
1136 The LGAC recommends that EPA more clearly identify how Preliminary Jurisdictional Determinations
1137 would be processed to avoid unnecessary permit delays. (Goodman Letter)

1138
1139 The LGAC recommends that EPA Administrator work with the Chief of the US Army Corps of Engineers
1140 to determine a process to reduce the issue of permitting delays of Section 404 permits. These delays are
1141 a significant and a costly issue for local governments. (LGAC 2014 Report)


1142
1143 The LGAC recommends that state agency staff be utilized to make jurisdictional calls and work in
1144 cooperation with local districts with subject matter expertise such as county-based Conservation Districts
1145 or water management districts (e.g. Florida Water Management District). These local agencies can work
1146 together with the Corps to streamline permitting. (LGAC 2014 Report)


1147
1148 The LGAC recommends that EPA regionalize wetlands delineation manuals to take into account
1149 regional and local variability of vegetation, hydromorphology and hydroperiods. (LGAC 2014 Report)


1150 The LGAC recommends that State agencies be delegated the authority to make jurisdictional
1151 determinations. These determinations could be certified by the EPA and Corps District staff. Potentially,
1152 private sector firms and/or individuals could be certified to make these determinations. This could relieve
1153 overburdened federal agencies and accelerate the determination/permit process.

1154 EPA and the Corps should encourage and provide incentives for States and Tribes to identify and
1155 protect significant state or unique waters such as sources for drinking water to protect.

1156  EPA and the Corps should provide mapping of jurisdictional waters (8-Digit HUC). It should also be
1157 accessible by zip code and available online.

1158  The LGAC recommends that EPA work further with the Committee to develop a cohesive strategy to
1159 address local tools for stream and tributary protection so that it does not interfere with local governments
1160 protecting and maintaining water resources for its citizens and communities. For example, many local
1161 governments have zoning ordinances and coastal management plans that are protective of streams,
1162 riparian areas, and sensitive wetland areas. It is unclear how a revised rule in its current state will affect
1163 our ability at the local level to protect our significant ecological areas. (LGAC 2014 Report)
1164

1165  The EPA should work with local communities to utilize the regulatory tools that the Clean Water Act
1166 (CWA) and the Safe Drinking Water Act (SDWA) provide in order to protect source water, especially for
1167 low-income, minority, rural and tribal communities where this threat remains. (LGAC Drinking Water
1168 Report 2016)
1169

1170  The LGAC strongly recommends that the EPA continue to explore how the SDWA and the CWA could
1171 be coordinated to better protect source water and our nation's water resources. In addition, the LGAC
1172 recommends that the EPA coordinate a Memorandum of Agreement with the U.S. Department of
1173 Agriculture's Natural Resources Conservation Service (NRCS) to explore ways to reduce agricultural
1174 runoff and improve soil health. (LGAC Drinking Water Report 2016)
1175
1176

1177 **STATE ASSUMPTION OF SECTION 404**

1178 *Background*

1179 Under current regulations, states and some tribes may seek delegation to implement CWA § 404 which
1180 governs dredge and fill activities in wetlands and other waters. This CWA assumption allows a state or
1181 tribe to regulate those waters and to take jurisdictional responsibility to condition, approve or deny
1182 dredge and fill permits in lieu of the federal Section 404 program administered by the Corps and EPA.
1183 The state or tribal program must be approved by the EPA and the Corps of Engineers. States and tribes
1184 play a significant role in implement CWA Section 404 Program through assumption and to fully
1185 integrated and comprehensive water program addressing the full range of state, tribal, and CWA
1186 requirements. Assumption allows for flexibility, less time constraints and the ability to integrate state and
1187 local water quality objectives.
1188

1189 The State of Michigan has received delegation authority and the LGAC was briefed on their program.
1190 Under the Michigan program, the permitting process is more streamlined and has incorporated other
1191 state statutory programs like CWA § 401 certifications, dam safety and other state regulatory programs.
1192 The average time of the permitting process is 21 days.⁷
1193

1194 Based on the Michigan example, the LGAC believes that states may more effectively administer the
1195 Section 404 program, especially in addressing regional issues. States can more effectively interact with
1196 local governments, businesses, agriculture and private landowners. (LGAC 2014 Report)
1197

⁷ "Wetlands Protection." Michigan Department of Environmental Quality. www.mi.gov/wetlands.

Recommendations:

The LGAC believes that State Assumed CWA and tribal-led programs may provide substantial cost-savings in time and money and should be investigated further. (LGAC 2014 Report)

The LGAC recommends that guidance be developed to facilitate State Assumption of the Section 404 program.

In order for state assumed programs to be successful, adequate resources must be made available and comparable water quality protections must be adopted by the state or tribal government. Despite these perceived barriers, the LGAC believes this is a highly worthwhile approach. Incentivizing the delegation program could achieve a strong return on investment. (LGAC 2014 Report)

Local agencies may also be more receptive to the rule if there are state-run programs which are more responsive to local and regional issues. (LGAC 2014 Report)

The LGAC strongly suggests federal incentives for States and Tribes to assume CWA Section 404 program. These federal incentives should also provide technical, financial and staffing resources to assume the CWA 404 program. (LGAC 2014 Report)

ENFORCEMENT

Background

The LGAC believes that enforcement will be important in implementing the CWA programs to follow the proposed rule. It is not possible to ascertain the impacts of enforcement on local governments without a revised rule in place. The LGAC also believes that clarified definitions contained within a revised rule will be critical to effective and equitable enforcement of the rule. (LGAC 2014 Report)

Recommendations:

The LGAC recommends that flexibility is included within the regulatory context so that conservation practices can be considered nationwide and be consistent, particularly on agricultural lands. (LGAC 2014 Report)

The EPA should work collaboratively with state regulators to reduce punitive approaches and increase facilitative solutions. Generally, communities facing fines and citations are already struggling with compliance. Fines rarely increase water quality; fines only reduce the local resources available to achieve compliance. A collaborative approach can be most effective in reaching water quality goals. (LGAC Drinking Water Report 2016)

1240 The LGAC recommends that EPA work with state and local governments once the final rule is
1241 developed regarding enforcement options. (LGAC 2014 Report)

1245 LOCAL SOLUTIONS -INTEGRATED PLANNING

1247 *Background*

1248 The LGAC believes that the CWA has had tremendously positive impacts on the rivers and streams of the
1249 United States which in turn has led to economic prosperity and well-being for our nation's communities.
1250 Communities and local governments are spending millions of dollars to improve our waterways and
1251 drinking water supplies. Some states even have more protective water standards than those required by
1252 federal law. The LGAC noticed a general feeling of distrust that the 2015 rule generated. Further clarity
1253 on definitions, jurisdiction and exemptions should further aid Integrated Planning. However, it is uncertain
1254 how a final rule will factor in Integrated Planning efforts in general. Furthermore, there is a great deal of
1255 uncertainty how CWA 404 and the rule will impact local ordinances and how it can be integrated into
1256 state, tribal and local water quality plans. (LGAC 2014 Report)

1259 *Recommendations:*

1260 The LGAC recommends that EPA work with cities and communities on Integrated Water Quality
1261 Planning that will incorporate all of the Clean Water Act provisions into local plans. This planning process
1262 is already ongoing and the LGAC looks forward to these proactive approaches to address water quality
1263 concerns while providing green infrastructure and multi-use amenities to serve our public and create jobs.
1264 (LGAC 2014 Report)

1266 The LGAC recommends that EPA incentivize local, tribal and state agencies to engage in Integrated
1267 Water Quality Planning and develop policies, programs and projects that further the goals of the Clean
1268 Water Act. The rule should not in any way discourage local efforts to improve water quality through
1269 projects and programs. (LGAC 2014 Report)

1271 ☐ **Question 7- What should the agencies consider in communicating the final rule to state, local
1272 and tribal governments to help them fully understand these regulatory changes and
1273 implementing them efficiently and most cost-effectively?**

1274 *Background*

1275 The LGAC believes that clear communication and outreach needs to happen at every level of government
1276 once a revised rule is developed. There are many misconceptions and uncertainties regarding EPA, the
1277 Army Corps of Engineers, and the rule's impact on CWA programs.

1279 What we learned from the 2015 rule, there were concerns heard throughout the outreach process, noted
1280 the mixed messages relating to the economic impacts.

1282 The LGAC recommends that the EPA share the LGAC findings and recommendations with the state
1283 environmental commissioners, state agricultural directors, state water directors, and other state officials.
1284 (LGAC Water Report 2014)